

“The Battle of Borodino revisited? Franco-Russian divorce”

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Applicable Statutory Laws in France European and International

Regulation Brussels II bis 2201/2003 on divorce of 27 Nov. 2003,

Regulation Rome III 1259/2010 on applicable Law to divorce of 20 Dec. 2010,

Regulation 4/2009 on maintenance obligations of 18 Dec. 2008,

The Protocol of the Hague on Law applicable to maintenance obligations, concluded on 29 Nov. 2007,

International Convention 14 March 1978 on matrimonial regime,



Litispensens with Russia



French Judges consider that an international litispensence defence can only succeed if the following are true (Civ.16, 26 Nov. 1974, Soc. *Miniera di Fragrie*)

- ✓ A claim has previously been brought before a Russian Court,
- ✓ The parties, the causes and the subjects of the claim are identical,
- ✓ The first-seized Court has jurisdiction over the case,
- ✓ The foreign Court's decision may be recognized in France.



IMPORTANT DECISIONS FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE EXISTENCE OF AN INTERNATIONAL LITISPENDENCE SITUATION:


- ❖ **CJEU, 9 November 2010, n°C-296/10, Purrucker:**
No international litispendence when one only asks for temporary measures to the first-seized Court.
- ❖ **CJEU, 6 October 2015, n°C-489/15:**
 - ✓ A situation of international litispendence is characterized when a judicial separation petition and a divorce petition are brought before two different Judges,
 - ✓ Such situation disappears if the first-seized Court dismisses the case,

Enforcement



No bilateral treaty between France and Russia for the recognition of Court Orders.

- **France**
To be recognised in France, a foreign Order must comply with the following conditions : (Civ.1^{ère}, 20 February 2007, *Cornelissen*, n°0514.082):
 - ❖ The foreign Court had jurisdiction over the case (i.e strong links) and no French exclusive jurisdiction,
 - ❖ The foreign Order conforms to French public policy requirements,
 - ❖ Absence of fraud.
- **Russia?**
To be recognised in the Russian Federation, a foreign Order must comply with the following conditions (article 409 of the Civil Procedure Code):
 - ❖ The jurisdiction has a treaty of mutual recognition of Court Orders in family matters with Russia,
 - ❖ The nature of the decision is such that it does not require any enforcement?




Matrimonial Property Regime (MPR)

- The matrimonial regime of a married couple is set by rules that organize asset administration and entitlement within the marriage, both during the marriage and upon its dissolution.
- Draft European Regulation on the Law applicable to MPRs [Art 2 COM/2011/0126 final – CNS 2011/0059] defines it as a "set of rules relating to the economic relations of the spouses between them vis-à-vis third parties".
- The MPR determines the powers of the spouses, either individually, or jointly, to administer their assets and defines the rights of third parties (generally creditors) in relation to the couple's estate.
- When the marriage terminates, the MPR of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets acquired during the marriage.

Primary / secondary regime

- The MPR of a couple is determined either by a contract entered into by the spouses or by virtue of the Law, in the absence of a contract.

Most common MPR in France : regime of community of assets, separation of property, universal community and participation.

a secondary regime

- A **primary regime** applies to a married couple residing in France regardless of the matrimonial regime chosen by the spouses,

It is a set of mandatory rules which apply automatically to all married couples and organises their *minima* duties and rights in respect of the management of assets and the administration of their estate for the purpose of protecting their family life [art 214 to 226 of the French Civil Code (FCC)].

Applies automatically to married couples residing in France, regardless of their respective nationality [Civ. 1re, 20 October 1987, Cresson].



Concealment of community assets

- « **Recel de communauté** » or **Concealment of community assets** [art 1477 of the FCC],
- **The spouse who has attempted to deprive the other spouse of his/her share of the community assets, will be - as a sanction- deprived of his/ her own share in the concealed asset to the benefit of the innocent spouse.**
- If the fraud is discovered, the perpetrator of the concealment will receive a smaller portion of the community assets in comparison to what he/she would normally have been entitled to, in application of the community of property regime, whilst the innocent spouse will receive a greater portion.

Concrete application of the law of retaliation.



Protection of the Family home

- French Law strictly prohibits the sale or any legal act that could be related to the matrimonial home.



« The spouses may not, separately, dispose of the rights whereby the housing of the family is ensured, or of the pieces of furniture with which it is furnished. The one of the two who did not give his or her consent to the transaction may claim the annulment of it: the action for annulment is open to him or her within the year after the day when he or she had knowledge of the transaction, without possibility of its ever being instituted more than one year after the matrimonial regime was dissolved. » [Art 215, 3rd paragraph of the FCC].



French Riviera Houses...

- ✓ The place has to be **qualified as the Family home** ;
- ✓ The **furniture** and its **content** too ;
- ✓ A **de facto separation of the spouses does not impede** on the notion of Family home, neither does the free enjoyment of the home ordered by a Judge as an interim measure [Civ. 1^{re}, 26 January 2011, n°09-13138].

Even if the house is titled in the sole name of the one of the spouses (personal property), the owner will not be able to sell it or rent without the prior consent of the other spouse or a Court Order.



The « Civil estate company » (SCI)

- Many spouses create an SCI ("*société civile immobilière*"), literally a real estate company, dedicated to own and manage a real property.

This civil legal structure is very attractive from a tax and practical point of view.



- The company is an independent legal entity and the partners' divorce is not a cause of action to wind up the company.

Indeed, the partners (spouses) will continue its activity despite an ongoing divorce.

Post-divorce issues
sharing tax (« droit de partage »)



- Orders relating to the winding up of matrimonial regimes are automatically transmitted to the **Tax administration that raises a tax of 2.5% applicable on the net total amount of the community assets** or on the **joint assets** in case of a separation of property regime.
- **It is supposed to be a worldwide assets tax,**

Structuring of corporate /civil legal entities

- **CARON case on fictitious companies** – if spouses were tempted by the creation of a company abroad that may own a real property in order to fraud the French tax system, rights of the other spouse or the reserved rights of their heirs (reserved portion) French courts sanction fraudulent company, ignoring the legal entity created.
- This principle lies with the Caron case [Civ. 1^{ère}, 20 mars 1985, n°82-15033].

A man created a company in the US, which owned a real property located in France, in order to avoid the imperative stipulations of the FCC. The "company veil" was voided, and his heirs –that he wanted to disinherit- were deemed heirs with consequent inheritance rights.



Conclusion

Need to be advised by a specialist
in **International Family Law** !

- **Anticipating Divorce** : *international prenuptial agreements and structuring the ownership of assets,*
- **Best Strategy on Divorce** : *which jurisdiction to choose ?*
- **Enforcement and Recovery of Assets** : *lifting the veil !*